Supreme Court, U.S.
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No. 99-18

In The

Supreme Court of the United States

KATHY LYNN JOSENHANS,

Petitioner,

vs.

SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, AND AMERICAN HOME PRODUCTS CORPORATION GROUP INSURANCE PLAN – UNITED STATES,

Respondents.

On Petition For Writ Of Mandamus To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM E. LAWTON, ESQUIRE
Fla. Bar No. 0163236
Counsel of Record
LAMAR D. OXFORD, ESQUIRE
Fla. Bar No. 0230871
DEAN, RINGERS, MORGAN & LAWTON, P.A.
P.O. Box 2928
Orlando, Florida 32802
407/422-4310

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW (RESTATED)

Whether a Circuit Court abuses its discretion by dismissing an appeal for Appellant's lack of prosecution and failure to comply with briefing deadlines established by the Court's Rules and Orders.

PARTIES TO THE PROCEEDING

Petitioner, Kathy Lynn Josenhans and her attorney, Frederick C. Morello, Law Office of Frederick Charles Morello, P.O. Box 1007, Daytona Beach, Florida 32115, appeared before the Eleventh Circuit Court of Appeals as plaintiff-appellant.

Respondents, Sherwood Medical Corporation, American Home Products Corp., and American Home Products Corp., Group Insurance-Plan – United States and their attorney, William E. Lawton, Dean, Ringers, Morgan & Lawton, P.O. Box 2928, Orlando, Florida 32802-2928, appeared before the Eleventh Circuit Court of Appeals as defendants-Appellees.

Respondents note in particular that Petitioner has violated the requirements of this Honorable Court's Rule 20(3)(a), which states:

> **"(3)(a) A Petition seeking a writ of prohibition, a *Writ of Mandamus*, or both in the alternative shall state the name and office or function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other Court."**

Petitioner has failed to state the name and office of every person against whom relief is sought by this Petition for Mandamus, particularly including the Honorable Judges of the Eleventh Circuit Court of Appeals to whom the Petition for Mandamus filed in this Honorable Court must be properly addressed. They include:

PARTIES TO THE PROCEEDING – (Continued)

"(1) **The Honorable Edward Carnes**
Judge of the U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

"(2) **The Honorable Stanley Marcus**
Judge of the U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303
(See, Appendix J to Petition for Mandamus)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

ORDERS ENTERED BELOW 1

STATEMENT OF THE BASIS FOR JURISDICTION.. 1

STATEMENT OF THE CASE 1

ARGUMENT 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) 5

In Re Beverly Mfg. Corp., 778 F.2d 656 (11th Cir. 1985) 6

Jackson v. Hensley, 484 F.2d 992 (5th CCA Fla. 1973) 5

Pioneer Service Co. v. Brunswick Assoc., Ltd., Partnership, 507 U.S. 380 (1993) 5, 7

Turner v. Duval County, Florida, 468 F.2d 919 (5th CCA Fla. 1972) 5, 6

United States v. Aerodex, Inc., 469 F.2d 1003 (5th CCA Fla. 1972) 5

ORDERS ENTERED BELOW

Petitioner Josenhans seeks this Honorable Court's issuance of the *Writ of Mandamus* to the United States Court of Appeals for the Eleventh Circuit, for its Judgment and Opinion entered March 16, 1999 (Appendix "J" to Josenhans' Petition). Petitioner also seeks this Honorable Court's review and issuance of the *Writ of Mandamus* to the Eleventh Circuit Court of Appeals for its Order denying Appellant Josenhans' third request for an extension of time for filing the Initial Brief and entry of dismissal of the appeal. (Appendix "F" to Petition), and Order denying Motion for Reconsideration (Appendix "H" to Petition).

STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner Josenhans attempts to invoke this Honorable Court's *Mandamus* jurisdiction under 28 U.S.C. § 1651.

STATEMENT OF THE CASE

Respondents strongly object to the number of non-record, uncited allegations and improper arguments made in Petitioner's Statement of the Case. Respondents will provide the Court with a summary of only the record activity below. In the interest of brevity, references will be made to the documents already of record in the Appendix to the pending *Petition for Writ of Mandamus* made by (PA-___).

On July 21, 1998, the U.S. District Court for the Middle District of Florida entered a Final Order granting Respondents' Motion for Summary Judgment on all claims made against it by Plaintiff Josenhans. Counsel for Plaintiff Josenhans then filed a Notice of Appeal to the Eleventh Circuit Court of Appeals. (PA-A).

On September 4, 1998, the Circuit Court informed Plaintiff Josenhans that the record was complete and Appellant's Initial Brief and Record Excerpts were due to be filed within forty (40) days, or by October 14, 1998. One day before that deadline, on October 13, 1998, Josenhans' counsel filed Appellant's first Motion for a 30-day extension of time to file the Initial Brief. (PA-B).

On October 14, 1998, the Circuit Court issued an Order granting Appellant Josenhans' Motion for Extension of Time, *in part*. The Court granted Josenhans' counsel fifteen (15) additional days to file Appellant's Brief, until October 29, 1998. (PA-C, ¶ 4). Additionally, the Circuit Court's Order specifically warned counsel for Appellant Josenhans that:

> **"This extension is granted subject to the condition that no additional extensions will be requested by the movant and that the specified document will be filed on or before this new date." (PA-C, ¶ 4).**

Despite that admonition, counsel for Josenhans filed still another Motion for an additional fourteen (14) day extension of time to file the Initial Brief. That Motion was dated October 27, 1998. (PA-D). By Memorandum Order dated October 30, 1998, the Circuit Court granted Appellant Josenhans an extension of time for *seven (7) days* until

November 6, 1998, for filing Appellant's Initial Brief. Again, the Circuit Court gave Josenhans' counsel the same warning that the extension was granted *only* subject to the condition that no additional extensions would be requested by the movant, and the specified document would be filed by November 6, 1998. (PA-D, ¶ 8-10).

Nevertheless, counsel for Appellant Josenhans filed still another (third) Motion for Extension of Time to file the Initial Brief. By Motion dated November 4, 1998, Appellant Josenhans requested another seven (7) day extension of time from the Circuit Court. (PA-G, ¶ 9-10). This third Motion for Extension of Time was filed one day before the Eleventh Circuit Court's third and final filing deadline of November 6, 1998. (PA-G, ¶ 10).

On November 12, 1998, counsel for Josenhans finally filed the Initial Brief of Appellant Josenhans. (PA-G, ¶ 15). That was six (6) days *after* the third and final deadline given by the Circuit Court for the filing of that Initial Brief.

On December 11, 1998, the Circuit Court of Appeals *sua sponte* entered its Order of Dismissal, for Appellant Josenhans' failure to timely file the Initial Brief. The Court also entered a simultaneous Order denying Appellant's third Motion for Extension of Time which sought until November 13, 1998 to file the Initial Brief. (PA-F).

On December 17, 1998, counsel for Appellant Josenhans filed an "Emergency Motion for Panel Consideration" of the Court's dismissal of the Appeal, and requested the Court reinstate the appeal. (PA-G). By Order filed January 25, 1999, a two-judge panel of the

Circuit Court entered an Order denying Appellant Josenhans' Motion to Reconsider the Court's Order of December 11, 1998, denying the Motion for a third extension of time and dismissing the appeal. The Court also denied Appellant's Motion to Reinstate the appeal. (PA-H).

Counsel for Josenhans then filed a Petition for Rehearing *en banc* by the Eleventh Circuit Court of its Order of January 25, 1999. (PA-H). By Order filed March 16, 1999, the Court of Appeals reviewed Josenhans' Petition for Rehearing *en banc* and the history of Josenhans' untimely prosecution of this appeal under the federal and local rules. (PA-J). In a two-page explanatory Order, the Circuit Court denied Appellant Josenhans' Motion to Reinstate the Appeal. (PA-J).

Petitioner Josenhans then filed a *Petition for Writ of Certiorari* with this Honorable Court, still pending in Case No. 98-2012. Respondents have filed a Brief in Opposition. Because that Petition is still pending before this Honorable Court, Respondents respectfully submit that the *Petition for Writ of Mandamus* filed by Petitioner Josenhans herein is redundant, duplicative, and a waste of this Honorable Court's time and resources. Respondents also note that Petitioner has apparently failed to serve the *Petition for Mandamus* on the additional proper parties to whom it is addressed, the Honorable Judges of the Eleventh Circuit of Appeals.

ARGUMENT

Without question, the Circuit Courts of Appeal must have the discretion and authority to demand compliance with their rules and regulations. Chaos would reign in this Honorable Court if every party sanctioned for failure to comply with a Circuit Court rule or deadline could simply turn the United States Supreme Court for further review of a Circuit Court's procedural decision.

Even when the sanction is dismissal, this Honorable Court for its own good and that of the federal appellate system must allow Circuit Courts to set their own boundaries for compliance. As this Court has stated with regard to the failure of appellants to comply with procedural rules and time deadlines,

> **" . . . inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect."** ***Pioneer Service Co. v. Brunswick Assoc., Ltd., Partnership,*** **507 U.S. 380, 391 (1993).**

The Eleventh Circuit Court has rarely had to opine on that obvious doctrine, since it adopted as precedent the decisions of its parent (the former Fifth Circuit Court) rendered prior to October 1981. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981). Even where the Appellant U.S. Government itself failed to timely file its Initial Brief on Appeal, the Circuit Court properly dismissed. *United States v. Aerodex, Inc.,* 469 F.2d 1003 (5th CCA Fla. 1972). *See also, Jackson v. Hensley,* 484 F.2d 992 (5th CCA Fla. 1973) (appeal summarily dismissed for lack of prosecution for Appellant's failure to file Brief within time fixed by the rules); *Turner v. Duval County, Florida,*

468 F.2d 919 (5th CCA Fla. 1972) (for Appellant's failure to file Brief within the time fixed by rules, appeal was properly dismissed for want of prosecution).

Nothing in Josenhans' argument in the *Petition for Mandamus* demonstrates to the contrary, or merits this Honorable Court's attention. The cases cited by Petitioner's counsel in support of the Petition do not involve, as here, the unsuccessful seeking of a third extension of time for filing a proper, conforming Brief after clear admonitions from the Court that only *one* extension would be granted. *See, i.e., In re Beverly Mfg. Corp.*, 778 F.2d 656 (11th Cir. 1985).

Josenhans concedes in the Petition that after *seeking* and *receiving* two prior extensions of time for filing the Initial Brief with the Eleventh Circuit Court, *and* each time being warned that no further extensions of time would be allowed or granted, Petitioner still filed a third Motion for Extension of Time on November 5, 1998 (one day before the Court's final deadline for filing) (Petition, p. 5-6). The argument that Petitioner's filing of a "54-page, non-conforming draft of her Initial Brief" on that date demonstrates that "Petitioner was not being dilatory" (Pet., p. 6) hardly rings true in that context. The Circuit Court's Order granting a rare *second* extension of time had specified that the *second* extension was granted *only* subject to the condition that no additional extensions would be requested or considered.

Simply put, this Honorable Court does not have the time or resources to continually delve into the Circuit Courts' decisions on appellants' failures to comply with their procedural rules and deadlines. This Court on a rare

occasion when it visited these issues restated the factors that the Courts of Appeal should consider in requiring compliance with their time deadlines:

> **"These include, as the Court of Appeals found, the danger of prejudice to the (opposing party), the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith."** ***Pioneer Service Co., supra,*** **at 391.**

Here, the *Petition for Writ of Mandamus* filed by Josenhans admits the multiple extensions of time Petitioner's counsel sought for filing the Initial Brief of Appeal *and* the warnings received when the Circuit Court granted two separate extensions of time. Petitioner's failure to heed those warnings and timely file the Brief conflict directly with the ultimate necessity that appeals meet procedural requirements and deadlines. Without same, the schedules of the Courts and opposing parties would be thrown into chaos. *Id.*

CONCLUSION

For all the reasons stated herein or to be found from a review of the record documents attached to the *Petition for Mandamus* that this Brief opposes. Respondents respectfully submit that the *Petition for Writ of Mandamus* filed herein should be DENIED.

Respectfully submitted,

WILLIAM E. LAWTON, ESQUIRE
Fla. Bar No. 0163236
LAMAR D. OXFORD, ESQUIRE
Fla. Bar No. 0230871
DEAN, RINGERS, MORGAN & LAWTON
P.O. Box 2928
Orlando, FL 32802
407/422-4310
Attorneys for Respondents